Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM—1976

No. 76-240

JOHN RYDER,

Petitioner,

vs.

DALLAS & MAVIS FORWARDING COMPANY, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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JOHN RYDER,

Petitioner,

vs.

DALLAS & MAVIS FORWARDING COMPANY, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT IN OPPOSITION

Prefatory Statement

Plaintiff-Petitioner [hereafter referred to as Petitioner] instituted an action sounding essentially in negligence, invoking the jurisdiction of the federal District Court under the diversity clause of the Judicial Code, 28 U.S.C. § 1391.

At the conclusion of a plenary trial on the merits, after the jury had been accurately charged by the trial court, to which no objections were noted or exceptions taken by either party, particularly in relation to the instructions to the jury on "res ipsa loquitur" (Circuit Court Pa1-2 to 25-25), the jury returned a unanimous verdict of no cause for action in favor of the defendant-respondent [hereafter referred to as Respondent], and against the Petitioner. The Petitioner then filed a Motion for New Trial, wherein both parties filed briefs with the District Court. After oral argument on said Motion, the District Court denied the Motion for New Trial, stating the factual and legal predicates therefor (Circuit Court Pa26-1 to Pa37-18; Pa39). The Order denying Petitioner's Motion was filed on September 29, 1975 (Circuit Court Pa39), and on October 22, 1975, Petitioner filed his Notice of Appeal to the Circuit Court "from the Order denying plaintiff's motion for an order vacating the jury verdict entered herein and granting a new trial entered in this action on the 29th day of September, 1975." No appeal has ever been taken from the Judgment entered upon the unanimous verdict of the jury (Record, *passim;* Circuit Court Pa40).

No transcript of the trial proceedings has ever been filed with the appellate court by Petitioner (Record, *passim*), including pleadings, with the exception of that which is contained in Petitioner's "Appendix to Appellant's Brief" (Circuit Court, Appendix to Appellant's Brief), namely:

1. Docket Entries of the District Court.
2. The Trial Court's Jury Charge.
3. Petitioner's Motion for New Trial.
4. A so-called "State Charge on 'Res Ipsa Loquitur'" [not in the trial proceedings record].

5. Order Denying Petitioner's Motion.
6. Notice of Petitioner's Appeal to the Circuit Court.

Counter-Statement of the Case

This negligence action involved an accident whereby the rear wheels had come off a flat bed trailer of Respondent, precipitating it to the ground, whereupon the chains broke and a steel submarine component fell off, striking the vehicle in which Petitioner was seated off the roadway.

Petitioner instituted no action against the manufacturer of respondent's vehicle, the manufacturer of any of the component parts thereof, or against the loader of the steel. No expert was called by either side, no metalurgical testing was undertaken of a "pin" which, in some unknown and undisclosed manner had become bent so as to eventuate the wheels coming off.

Absent any specific showing of negligence on the part of Respondent, the District Court invoked the doctrine of "res ipsa loquitur", on which the jury was charged with commendable accuracy (Circuit Court Pa3-7 to Pa4-17), and in which charge both parties fully acquiesced and made no objections or took any exceptions (Record, *passim*).

Respondent's lack of knowledge of any defect prior to the accident was undisputed. Uncontradicted testimony was adduced at trial that Respondent maintained a force of mechanics who regularly inspected all Respondent's vehicles. The driver of the subject vehicle testified that, after the accident, when he endeavored to ascertain what had occurred, he discovered what he described as a "pin" [actually, a steel rod about an inch and a half in diameter]

had somehow bent, permitting the wheels to shift. Petitioner merely showed that the wheels had come off; he then showed his damages and rested, relying wholly upon the doctrine of "res ipsa loquitur."

At trial, Respondent showed that it had no knowledge of any defect in the vehicle or the way the "pin" was fastened on; that the vehicle had been regularly inspected by its personnel; that it had been used that day for 300 miles without the slightest mishap up to the accident; that when the vehicle was used shortly before the accident, it worked perfectly all right and seemed in apparent good condition; and that, at no time, was there anything to be seen about it to indicate that it was not in such good condition. The Petitioner offered no further or other evidence and neither contradicted nor disputed Respondent's evidence.

The cause was submitted to the jury under accurate instructions governing the determination of defendant's negligence vel non. The unanimous verdict reflects that the jury declined to draw any permissible inference of negligence on the part of Respondent, an issue, under uniform decisional law, preeminently within the peculiar province of the jury.

At no time during the entire course of the trial proceedings or before the Circuit Court did the Petitioner raise any constitutional issue, much less the due process clause of the Fourteenth Amendment of the Constitution of the United States. (Record, *passim*).

Summary of Argument

Notwithstanding the crystal clear and conclusive facts that Petitioner (i) utterly failed to raise any constitutional question during the entire proceedings below, (ii) fully acquiesced, without reservation or qualification, in the trial court's instructions to the jury, and particularly as to those on "res ipsa loquitur", (iii) and totally failed to remotely comport the Rule 51, Fed. R. Civ. Proc., he, now, for the first time, as an afterthought of an adverse unanimous jury verdict, and based upon nothing but a figmental imagination, says that:

> "Petitioner was denied his Fourteenth Amendment right of due process [solely because of] a jury's inability to comprehend the doctrine of 'res ipsa loquitur'." [bracketed material supplied]. (Pb5-29)

The issue urged as the sole basis for granting the Writ has been so plainly foreclosed by the decisions of this Court, and virtually every Court in the land, as to cause it to be frivolous and without any support in reason whatsoever. Petitioner has cited not a single factual or legal authority supportive of the theory which he urges upon this Court.

REASONS FOR DENYING THE WRIT

A. The grounds for certification, wholly unsupported factually and legally, are so lacking in substance that they may properly be designated as frivolous.

The sole ground for appeal to the Circuit Court, as well as for the petition for certiorari, is an alleged nebulous, unspecified, undefined, undeterminable and nondescript alleged error in the jurors' understanding of the trial court's concededly accurate instructions on "res ipsa loquitur."

The Notice of Appeal filed by petitioner with the Circuit Court of Appeals states only that (Circuit Court Pa40-15):

> "John Ryder, plaintiff . . ., hereby appeals to the United States Court of Appeals for the Third Circuit from the Order denying plaintiff's motion for an order vacating the jury verdict entered herein and granting a new trial entered in this action on the 29th day of September, 1975."

On May 24, 1976, after the filing of briefs by both parties to the action and the submission of the case under Third Circuit Rule 12(6), the Circuit Court entered a Judgment Order that (Pa2-4 to 10):

> "Upon consideration of all contentions raised by the appellant and finding that the district court's denial of a motion for a new trial is not appealable under 28 U.S.C. §§ 1291 and 1292(a), see *Fairmont Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 481-83 (1933) and *Greenwood* v. *Greenwood*, 224 F. 2d 318, 319 (3d Cir. 1955), it is
>
> "ADJUDGED AND ORDERED that the appeal be and is hereby dismissed.
>
> "Each party to bear its own costs."

It has been settled by a long and unbroken line of decisions that the refusal to grant a new trial is not assignable as error.

Hall v. *Weare*, 92 U.S. 728, 732-733, 25 L. Ed. 500 (1875).
Chicago, St. Paul M. & O. Ry. Co. v. *Pender Drainage District*, 183 F. 2d 773 (8th Cir. 1950).
Marshall's U. S. Auto Supply v. *Cashman*, 111 F. 2d 140, 141 (10th Cir. 1940).

Ford Motor Co. v. *Busam Motor Sales*, 185 F. 2d 531, 533-534 (6th Cir. 1950).
Donovan v. *Esso Shipping Corp.*, 259 F. 2d 65, 68-69 (3d Cir. 1958).
Awkwright Mutual Ins. Co. v. *Philadelphia Electric Co.*, 427 F. 2d 1273, 1275-1276 (3d Cir. 1970).
Howell v. *Terminal R. Ass'n of St. Louis*, 155 F. 2d 807, 808 (8th Cir. 1946).

Significantly, at no time did the petitioner ever make a motion for a directed verdict, much less for judgment non obstante veredicto. In the absence thereof, the insufficiency of evidence to sustain the verdict of the jury and judgment entered thereon is not open to review.

Traders & Gen. Ins. Co. v. *Shoemake*, 199 F. 2d 85, 86 (10th Cir. 1952).
McCarthy v. *Safeway Stores*, 157 F. 2d 676 (2d Cir. 1946).
Jorgensen v. *York Ice Machinery Corp.*, 160 F. 2d 432, 434-435 (2d Cir. 1947), cert. denied 332 U.S. 764, 68 S. Ct. 69, 92 L. Ed. 349 (1947).
Srybnik v. *Epstein*, 230 F. 2d 683, 686 (2d Cir. 1956).
Zimmerman v. *Emmons*, 225 F. 2d 97, 99-100 (9th Cir. 1955).
Budge Manufacturing Co. v. *United States*, 280 F. 2d 414 (3d Cir. 1960).
Atlantic Coast Lines R. Co. v. *Mims*, 199 F. 2d 582 (5th Cir. 1952).

The holdings in *Flint* v. *Youngstown Sheet & Tube Co.*, 143 F. 2d 923, 924 (2nd Cir. 1944), appear quite apropos to the case at bar:

> "In a federal court the denial of a motion for a new trial brings up nothing for review in an appellate court. *Missouri Pac. R. Co.* v. *Chicago & A. R. Co.,* 132 U.S. 191, 10 S. Ct. 65, 33 L. Ed. 309; *Fishburn* v. *Chicago, M. & St. P. Ry Co.,* 137 U.S. 60, 11 S. Ct. 8, 34 L. Ed. 585 . . . If the plaintiffs wished to assert that there was no case to go to the jury, they were bound to move for a directed verdict. They may not take a verdict and then complain that it is not what they expected; or at least their right to complain ends with the trial judge . . . Under federal practice an appellate court will not consider the question of the sufficiency of the evidence in the absence of a request for an instructed verdict. *Hartford Life & Annuity Ins. Co.* v. *Unsell,* 144 U.S. 439, 12 S. Ct. 671, 36 L. Ed. 496; *Hansen* v. *Boyd,* 161 U.S. 397, 16 S. Ct. 571, 40 L. Ed. 746 . . ."

Accord: *Rotondo* v. *Isthmian Steamship Co.,* 243 F. 2d 581, 582-583 (2d Cir. 1957).

As stated in 5B *C.J.S., Appeal & Error,* § 1817, page 153:

> "[I]n the absence of a showing to the contrary, a ruling by an intermediate court, on a motion to dismiss the appeal, will be presumed to be justified by the facts of the case,"

and, as said in *Southern Pac. R. Co.* v. *Smith,* 83 F. 2d 451, 452 (9th Cir. 1936):

> "We presume, of course, that the jury followed the court's instructions in this regard, and that the verdict was justified by the evidence, particularly in view of the fact that the appellant has not seen fit to include . . . a full statement of the evidence."

Lindsey v. *Moyle,* 358 F. 2d 727, 728 (9th Cir. 1936).
Sims v. *Texas and New Orleans R. Co.,* 267 F. 2d 37, 38 (5th Cir. 1959).
Ford Motor Co. v. *Brady,* 73 F. 2d 248, 250 (8th Cir. 1934).
Cudahy Packing Co. v. *McBride,* 92 F. 2d 737, 738 (8th Cir. 1937), cert. denied 303 U.S. 639, 58 S. Ct. 526, 82 L. Ed. 1099 (1938).

That the Judgment Order of the Court below is fully justified by the facts of the case appears to be crystal clear.

None of the facts of the case has been brought up before the Circuit Court or before this Court. Indeed, the Circuit Court "upon consideration of all contentions raised by the appellant" (Pa2-4), and in citing the *Greenwood* case, *supra,* was fully mindful of its own holdings in that case, 224 F. 2d, at page 319, that:

> ". . . where there has been a final judgment and an appeal from the denial of a motion for a new trial appears to be an inartificial [sic] attempt to obtain a review of that judgment, a Court of Appeals, may, under exceptional circumstances, act upon such an appeal as if it were taken from the judgment . . . [but] we see no reason to treat this appeal as seeking a review of anything other than the denial of a new trial which it designates." [bracketed material supplied].

In effect, peitioner argues[1] that there are present in the case at bar "exceptional circumstances" why the Circuit Court "should have considered the appeal from the District Court on the merits."

It is clear as the nose in a man's face that the petitioner, at no time during the entire course of the trial proceedings, notwithstanding the fact that he was accorded every opportunity so do to, made even the vaguest objection, or took any exception, to the court's instructions on "res ipsa loquitur", much less did he ever proffer or submit

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[1] The Petition for Certiorari asserts that:

> "Petitioner moved for a new trial. While awaiting a hearing on the motion, the time for appealing from the jury verdict expired." (Pb3-10).

That such contention appears to be an absurdity is clear from the second paragraph of Rule 4(a), Federal Rules of Civil Procedure, which expressly provides that:

> "The running of time for filing a notice of appeal is terminated . . . by a timely motion filed . . . and the full time for appeal . . . commences to run and is to be computed from the entry . . . of . . . orders . . . denying a motion for a new trial under Rule 59."

Even more enigmatic is petitioner's bald assertion that "the Circuit Court held that the appeal should have been from the jury verdict." (Pb5-25). We find no such holding, particularly when it is the settled rule of law that no appeal lies from a jury verdict; only a judgment rendered on the verdict is appealable.

> 4 *Am. Jur. 2d, Appeal and Error,* § 77, page 593.
>
> 4 *C.J.S., Appeal & Error,* § 122, page 376, and *id.,* § 153(b), page 516.
>
> *Annotation,* 73 *A.L.R. 2d* 295, § 16(c).
>
> *United States* v. *Long Branch Distilling Co.,* 262 F. 768 (5th Cir. 1920).

any special instructions or requests therefor on that issue, or for that matter on any other issue, either orally or in writing. Indeed, at the conclusion of the trial court's charge to the jury, he declared without hesitation or reservation that he had "no exceptions" whatsoever thereto. It is beyond debate that at all times during the trial proceedings, petitioner fully acquiesced in the charge. Even at oral argument on his motion for a new trial, he unqualifiedly reasserted and reaffirmed the position taken by him during the course of trial, asserting, through his counsel that:

> "I didn't have any quarrel with the Court's charge as to res ipsa loquitur." (Circuit Court, Pb30-17).
>
> "Now, I don't contend that this was reversible error by any means at all." (Circuit Court, Pb34-9).

Thus factually grounded, we advert to Federal Rule of Civil Procedure 51, which in providing that:

> "No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the ground of his objection.",

was an established precept of civil procedure long prior to the promulgation of the new rules. *Atlantic Coast Lines R. Co.* v. *Bennett,* 251 F. 2d 934, 937-938 (4th Cir. 1958). It is a salutary provision designed to give fair notice to the trial judges of the precise nature of the objections to a charge, and it obviates a retrial of cases when by design or through sheer neglect the losing parties fail to raise points during the progress of the case in the trial court. It has been too frequently and con-

sistently held to require the extended citation of cases that, in the absence of specific compliance with the mandatory provisions of Rule 51, *supra,* no appeal will lie.

Palmer v. *Hoffman,* 318 U.S. 109, 119-120, 63 S. Ct. 477, 87 L. Ed. 645 (1943), 144 A.L.R. 719 (1943), reh. denied 318 U.S. 800, 63 S. Ct. 757, 87 L. Ed. 1163 (1943).

Allis v. *United States,* 155 U.S. 117, 122-124, 15 S. Ct. 36, 39 L. Ed. 91 (1894).

Moore's Federal Practice (1975), vol. 5A, § 51.04, and all cited cases.

DeVitt and Blackmar, Federal Jury Practice and Instructions (2d edition, 1970), vol. 1, § 7.03, and all cited cases.

Wright & Miller, Federal Practice and Procedure (1971), § 2551, and all cited cases.

As stated in *Reagan* v. *Aiken,* 138 U.S. 109, 113, 11 S. Ct. 283, 39 L. Ed. 91 (1891):

> "Thus the law was fully given by the court to the jury [and] we are bound to presume . . . that it was correctly stated from the fact that plaintiffs . . . took no exception to it . . . [I]n the federal courts . . . a motion for a new trial is a mere application to the discretion of the trial court, and it is too late then to tender for the first time exceptions to the ruling it made at trial . . . For these reasons, there is nothing in respect to the instructions . . . given, which can now be considered."

But notwithstanding the unbroken line of decisional law in point, as aforesaid, petitioner now argues substantially, despite the conceded and conclusive facts, that:

(1) the instruction on "res ipsa loquitur" was an accurate statement of the law,[2] in which he is utterly unable to point to a monosyllable, much less a phrase, which can be said to constitute error;[3]

(2) the instruction was in full conformity with the well-settled and uniform decisional law of (a) all New Jersey

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[2] In re-affirming his position before the Courts below, the petitioner states in his Petition for Certiorari:

> "At trial, the judge . . . instructed the jury on the doctrine of 'res ipsa loquitur'. The instruction was given as it customarily is." (Pb3-18).
>
> "[T]he Court gave the jury the customary charge." (Pb3-7).

[3] The fundamental principle of res ipsa loquitur, as it obtains in New Jersey and in this federal district, as well as in most jurisdictions, is stated with commendable accuracy and succinctness in *Gould* v. *Winokur,* 98 N.J. Super. 554, 563-564, 237 A. 2d 916 (Law Div. 1968), affirmed 104 N.J. Super. 329, 250 A. 2d 38 (App. Div. 1969), certif. denied 53 N.J. 582, 252 A. 2d 157 (Sup. Ct. 1969), as follows:

> "[T]he effect of applying res ipsa loquitur in New Jersey is simply to recognize a permissible inference which the jury may or may not draw. Were the doctrine applied, there would be no legal requirement which would force a defendant to offer an explanation; the burden of proof would remain with the plaintiff. Absent an explanation, a plaintiff would not be entitled to a directed verdict, nor, if the jury refused to draw the inference [of negligence], could a jury verdict of no cause be set aside. [. . . cited cases omitted . . .]." (bracketed material supplied).

State courts,[4] (b) the federal courts in this judicial district,[5] and (c) indeed, the Supreme Court of the United States,[6] that:

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[4] *Lorenc* v. *Chemirad Corp.*, 37 N.J. 56, 179 A. 2d 401 (Sup. Ct. 1962).

Wildauer v. *Rudnevitz*, 119 N.J.L. 471, 473, 197 A. 252 (E. & A. 1938).

Bornstein v. *Metropolitan Bottling Co.*, 26 N.J. 263, 269-270, 139 A. 2d 404 (Sup. Ct. 1958).

Gaglio v. *Yellow Cab Co.*, 63 N.J. Super. 206, 211, 164 A. 2d 353 (App. Div. 1960).

Leone v. *Rutt's Hut, Inc.*, 55 N.J. Super 485, 492, 151 A. 2d 44 (App. Div. 1959).

Stackenwalt v. *Washburn*, 42 N.J. 15, 30, 198 A. 2d 454 (Sup. Ct. 1964).

Magner v. *Beth Israel Hospital*, 120 N.J. Super. 529, 533, 295 A. 2d 363 (App. Div. 1972).

Kahalili v. *Rosecliff Realty, Inc.*, 26 N.J. 595, 606-608, 141 A. 2d 301 (Sup. Ct. 1958), 66 A.L.R. 2d 680, 688-689 (1959).

Vespe v. *DiMarco*, 43 N.J. 430, 204 A. 2d 874 (Sup. Ct. 1964).

[5] *Joseph T. Ryerson & Son, Inc.* v. *H. A. Crane & Brothers, Inc.*, 417 F. 2d 1263, 1265-1266 (3d Cir. [N.J.] 1969).

Hanley v. *Heckler*, 380 F. 2d 986, 987 (3d Cir. [N.J.] 1967).

Clarke v. *Reiss*, 148 F. Supp. 135, 139 (D.C. N.J. 1957).

Caputo v. *United States*, 157 F. Supp. 568, 569-570 (D.C. N.J. 1957).

[6] *Johnson* v. *United States*, 333 U.S. 46, 49, 68 S. Ct. 391, 393, 92 L. Ed. 468 (1948).

Jesionowski v. *Boston & Maine R. Co.*, 329 U.S. 452, 457, 67 S. Ct. 401, 91 L. Ed. 416 (1947).

> "At trial in the District Court petitioner relied heavily on the doctrine of 'res ipsa loquitur', and the Court gave the jury the customary charge. The jury returned a verdict of no cause . . . The instruction was given as it customarily is. It was read matter of factly, without explanation and as part of the overall charge." (Pb3-18 to Pb3-22)

The decisional law in point is too well entrenched and settled to require any extended citation of authorities:

> "A party who has tried his case on a particular theory below and acquiesced in instructions purporting to present the case on his own theory, cannot afterwards question their correctness on appeal."
>
> 5 *Am. Jur. 2d, Appeal and Error*, § 623, page 82. *United States* v. *Atkinson*, 297 U.S. 157, 56 S. Ct. 391, 80 L. Ed. 555 (1936).

> "Appellant, having taken no exceptions to the charge, and having failed to request the court further to charge the jury, may not be heard in this Court on its claim of 'Basic Errors in Charge of the Court,' Rule 51, Fed. R. Civ. P. [. . . cited cases omitted . . .]."
>
> *Lifetime Siding Co.* v. *United States*, 359 F. 2d 657, 660 (2d Cir. 1966), cert. denied 385 U.S. 921, 87 S. Ct. 233, 17 L. Ed. 2d 1441 (1966).

It is settled beyond debate that a party may not sit by without objection to an instruction, and after verdict and judgment, when it is too late for the district court to change its charge, complain for the first time on appeal of alleged error of the district court, since failure to object to instruction subjects an appellant to the barrier of

rule precluding consideration thereof for the first time by a court of appeals.

Moore's Federal Practice (1975), vol. 5A, § 51.04, pages 2503, et seq.
Gulf M. & O. R. Co. v. *Thornton,* 294 F. 2d 104 (8th Cir. 1961).
Western Fire Ins. Co. of Fort Scott, Kan. v. *Word,* 131 F. 2d 541 (5th Cir. 1943).
Hays v. *United Fireworks Mfg. Co.,* 420 F. 2d 836 (9th Cir. 1969).

Judgment for defendant could not be reversed on the ground that the charge was insufficient, when it was correct, and plaintiff had made no objection to any failure of the trial judge to elaborate on it.

Feinman v. *A. H. Bull S.S. Co.,* 216 F. 2d 393 (3rd Cir. 1954).

Where, as here, a party requested no amplifying, clarifying, or further instructions of any kind whatever on res ipsa loquitur, and made no objection to the charge as given, nothing is preserved to allege an error on appeal in the instructions.

United States v. *Muncy,* 526 F. 2d 1261, 1263 (5th Cir. 1976).
Ryska v. *Anderson,* 70 Ida. 207, 214 P. 2d 874, 876 (Sup. Ct. 1950).

An objection, even if one had been seasonably noted in the trial court, to the effect that an instruction is not a full and complete statement of the law is too indefinite and presents no question for review.

75 *Am. Jur. 2d, Trial,* § 912, pages 779-780, and *id.,* § 913, page 780.

Jacobs v. *Southern R. Co.,* 241 U.S. 229, 36 S. Ct. 588, 60 L. Ed. 970 (1916).
Holder v. *United States,* 150 U.S. 91, 92, 14 S. Ct. 10, 37 L. Ed. 1010 (1893).
Palmer v. *Hoffman, supra,* 318 U.S., at pages 119-120.
State v. *Carabajal,* 26 N.M. 384, 193 P. 406, 409 (Sup. Ct. 1920), 17 A.L.R. 1098 (1922).
Smith v. *Edward M. Rude Carrier Corp.,* 151 W. Va. 322, 151 S.E. 2d 738 (Sup. Ct. 1966).

Indeed, petitioner's vague contentions before this Court appear to fall squarely within the above principle.

Where a litigant makes no objection at the time and invokes no ruling of the trial court, there is no error of which he may later complain, *Hall* v. *Boise Payette Lumber Co.,* 63 Idaho 686, 125 P. 2d 311, 315 (Sup. Ct. 1942), wherein the Court went on to say:

"'If the instructions given are correct as far as they go (and appellant here does not contend that the foregoing instruction is not correct as far as it goes) . . . it can not assign as error that the court omitted to instruct on all points involved in the case, if the attention of the court has not been directed by special requests for instructions on those points.'"

5 *Am. Jur. 2d, Appeal and Error,* § 623, page 82.
Bertrand v. *Southern Pacific Co.,* 282 F. 2d 569 (9th Cir. 1960), cert. denied 365 U.S. 816, 81 S. Ct. 697, 5 L. Ed. 2d 694 (1961).
Standard Oil Co. v. *Burleson,* 117 F. 2d 412 (5th Cir. 1941).
Asha v. *Goldsten,* 78 U.S. App. D.C. 349, 140 F. 2d 702 (1944).

Flying in the face of the uniform decisional law in point, and without the citation of a monosyllabic supportive factual or legal authority, petitioner embarks upon a theory that to us is so lacking in substance that it may properly be designated as frivolous. He baldly states in bold print that (Pb16):

> "The procedure in the trial court contained an inherent denial of due process."

Upon final analysis, it is clear as the sun that this so-called "inherent denial of due process" is nothing more or less than the unvarnished fact that the jury did not return a verdict in his favor.

He brought no facts of this negligence action before the Circuit Court, and he brings none before this Court. The assignment in his Petition can scarcely be called an assignment of error. It is too vague and general and points out no particular error. The assignment refers to no specific ruling o fthe trial court, but is a general challenge to the correctness of the verdict of the jury. Instead of a fair and sincere effort to show the trial court was in error, petitioner's brief in the Circuit Court and his Petition before this Court is a mere challenge to respondent to prove that the trial court was right. And it is an attempt to place upon the court the burden of discovering, without assistance from petitioner, any weaknesses in the arguments of respondent. Assuredly, petitioner was entirely willing to speculate on the jury verdict, and had it been favorable to him, he would not be here complaining of a concededly accurate and flawless jury instruction. Certainly, a petitioner is not permitted to evade or shift his responsibility in this manner. See, *In re Estate of Palmer,* 145 Cal. App. 2d 428, 302 P. 2d 629, 632-633 (Cal. App. 1956).

The party complaining of the action of the lower court "must lay his finger upon the point of objection and must stand or fall upon the case he made in the court below." *Krause* v. *Snyder,* 87 F. 2d 723, 725 (8th Cir. 1937). See, also, *Mill Owners Mut. Fire Ins. Co.* v. *Kelly,* 141 F. 2d 763, 765 (8th Cir. 1944).

A contention by an appellant unsupported by argument and citation of supporting authorities is entirely inadequate and ineffective, and presents nothing for review. *Shaw* v. *Calgon, Inc.,* 35 N.J. Super. 319, 329, 114 A. 2d 278, 283 (App. Div. 1955).

If the petitioner complains that the feature of "res ipsa loquitur" was not sufficiently covered, the proper procedure would have indicated that he comply with Rule 51, *supra,* and seasonably tender such instruction. Failing to do so, the petitioner cannot now be heard to complain. It is submitted that his claim in such respect is utterly devoid of the slightest merit or substance.

Ries v. *Lynskey,* 452 F. 2d 172 (7th Cir. 1971).
Piechoski v. *Grace Lines, Inc.,* 409 F. 2d 66, 69 (3d Cir. 1969).
Yoham v. *Rosecliff Realty Co.,* 267 F. 2d 9, 11 (3d Cir. 1959).
Fulton v. *Chicago, Rock Island & Pacific R. Co.,* 481 F. 2d 326, 338-339 (8th Cir. 1973), cert. denied 414 U.S. 1040, 94 S. Ct. 540, 38 L. Ed. 2d 330 (1973).
Atlantic Coast Lines R. Co. v. *Bennett, supra,* 251 251 F., at 937-938 (4th Cir. 1958).

See, also:

Bradford Builders, Inc. v. *Sears, Roebuck & Co.,* 270 F. 2d 649, 655 (5th Cir. 1959).

Tornaquindici v. *Bocchicchio,* 11 N.J. Super. 179, 184-186, 78 A. 2d 121, 123-124 (App. Div. 1951).

Ignoring the basic presumptions constituting the heart and sinew of our system of jurisprudence from earliest recorded times—the jury system as we know it to exist in Anglo-Saxon jurisprudence—the petitioner embarks upon what we submit to be nothing less than reductio ad absurdum argument. He says that he was essentially denied due process of law under the Constitution of the United States because:

(1) [Every jurors'] "memory is woefully unreliable." (Pb4-27).

(2) "[T]here can be no justification for assuming that [any jury] will undoubtedly" follow "directions" [or instructions of the Trial Court, however accurate those instructions may be]. (Pb4-31). [bracketed material supplied].

(3) "The human experience demonstrates that the average man is not vested with the faculties or comprehension and recall required to secure his assured performance of the tasks set out . . . By what logic, then, do we vest him with such faculties when he serves on a jury? Our trial procedure transmutes the juryman to a being possessed of abilities not possessed by the ordinary man. The human experience demonstrates that the transmutation does not take place." (Pb5-3).

(4) "A litigant who depends to any degree upon the doctrine of 'res ipsa loquitur' is required to depend for a fair trial upon a presumption as to the capacity of a jury which is false. The presumption

is false as a matter of human experience. What is false as a matter of human experience is false with finality and no legislative or judicial benediction can improve it." (Pb5-12).

(5) "The ability of a jury to understand an instruction on 'res ipsa loquitur' must be determined with reference to the ability of the human mind to absorb any information that is given to it in as cursory a fashion as the instruction. The universal experience testifies convincingly that the ability is limited indeed." (Pb4-5).

(6) "To what extent, then, may a jury justifiably be presumed to have comprehended an instruction on 'res ipsa loquitur'? No law, either statutory or decisional, may properly be invoked for a factual answer to the question. There may, indeed, be decisions that a jury is 'presumed' to comprehend. The presumption, however, is based on fiat rather than fact." (Pb3-29).

As best as we are able to garner from such an enigmatic argument, the petitioner appears to urge that this Court should, by judicial fiat, decree the virtual abolition of our entire jury system, entrenched in our legal system from earliest times—the very bulwark of our system of jurisprudence— . . . on the sole ground that it is bottomed upon nothing short of an infallibly false legal and factual premise and presumption.

In so arguing, petitioner's problem is to avoid Scylla without being drawn into Charybdis.

It is, of course, the basic rule of law from time immemorial—a presumption upon which our entire system of jurisprudence is grounded—that a jury is presumed to have been composed of intelligent people and that it un-

derstood the instructions as given and correctly applied them to the evidence. 5 *C.J.S., Appeal & Error,* § 1562 (3), pages 1214-1221, and the exhaustive decisional law cited therein. The fundamental assumption is that "every jury will base their verdict strictly on the merits of the case before them . . . That assumption is the basic justification of fact-finding by jury—one of the peculiar excellences of our legal system." *Stoelting* v. *Hauck,* 32 N.J. 87, 104, 159 A. 2d 385, 394 (Sup. Ct. 1960). Needless to add, a contrary, or other presumption, would eventuate in the utter annihilation of our jury system.

In the absence of a contrary showing, as herein, it must be assumed that the jury understood and followed the trial court's instructions.

> *Baltimore & Ohio R. Co.* v. *Felgenhauer,* 168 F. 2d 12, 17 (8th Cir. 1948).
>
> *Crockett Engineering Co.* v. *Ehret Magnesia Mfg. Co.,* 81 U.S. App. D.C. 159, 156 F. 2d 817, 820 (1946).
>
> *Husky Refining Co.* v. *Barnes,* 119 F. 2d 715, 717 (9th Cir. 1941), 134 A.L.R. 1221, 1224 (1941).

The petitioner's theory is grounded substantially upon his asseveration that, as a matter of absolute fact and therefore, as a concomitant matter of absolute law, all jurors lack the ability not only to follow proper instructions, but also to conscientiously observe and apply them, whereby all jury verdicts inescapably eventuate in a denial of due process of law to one or all litigants.

In so arguing, the petitioner evidently finds himself at diametric odds not only with the Supreme Court of New Jersey which, consistent with the universal holdings in point, said that:

> "[T]he courts must rely upon the juror's ability and willingness to follow . . . instructions without cavil or question. [. . . cited cases omitted . . .]."
>
> *State* v. *Manley,* 54 N.J. 259, 270, 255 A. 2d 193, 199 (1969), 43 A.L.R. 3d 1062 (1972),

but also with this Court, which, in *Shotwell Mfg. Co.* v. *United States,* 371 U.S. 341, 367, 83 S. Ct. 448, 463, 9 L. Ed. 2d 357, 375 (1963), reh. denied 372 U.S. 950, 83 S. Ct. 931, 9 L. Ed. 2d 975 (1963), stated that:

> "The instruction is clear. It must be presumed that the jury concientiously observed it."

These fundamental presumptions are so deeply embeded in the very groundwork of our legal system that even jurors themselves cannot be heard to testify to impeach their own verdict that they did not fully and thoroughly understand, comprehend, follow and apply the instructions of the trial court.

> *McDonald* v. *Pless,* 238 U.S. 264, 35 S. Ct. 783, 59 L. Ed. 1300 (1915).
>
> *Hyde* v. *United States,* 225 U.S. 347, 384, 32 S. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614 (1912).
>
> *Clark* v. *United States,* 289 U.S. 1, 18, 53 S. Ct. 465, 470, 77 L. Ed. 993 (1933).
>
> *Pessin* v. *Keenland Association,* 298 F. Supp. 593 (E.D. Ky. 1969).
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> *Domeracki* v. *Humble Oil & Refining Co.,* 443 F. 2d 1245, 1247-1248 (3d Cir. 1971), cert. denied 404 U.S. 883, 92 S. Ct. 212, 30 L. Ed. 2d 165 (1971).
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> *Stein* v. *New York,* 346 U.S. 156, 178-179, 73 S. Ct. 1077, 1099, 97 L. Ed. 1522 (1953).

Bateman v. *Donovan,* 131 F. 2d 759, 765 (9th Cir. 1943).
Rotondo v. *Isthmian Steamship Co., supra,* 243 F. 2d, at 582-583.
76 *Am. Jur. 2d, Trial,* § 1220, pages 176-177.

This precept of law is stated with commendable terseness and accuracy in *Capella* v. *Baumgartner,* 59 F.R.D. 312, 314-316 (S.D. Fla. 1973), affirmed 494 F. 2d 36 (5th Cir. 1974):

> "A challenge to a jury verdict must be supported by legally competent proof, and it is well settled that, as a general rule, a juror cannot impeach his verdict after the jury has been discharged. McDonald v. Pless, 238 U.S. 264, 35 S. Ct. 783, 59 L. Ed. 1300 (1915); Hyde v. United States, 225 U.S. 347, 32 S. Ct. 793, 56 L. Ed. 714 (1912); York v. Chrysler-Plymouth, Inc. v. Chrysler Credit Corp., 447 F. 2d 786, 794 (5th Cir. 1971); Womble v. J. C. Penney Co., 431 F. 2d 985, 989 (6th Cir. 1970); United States v. Schroeder, 433 F. 2d 846, 851 (8th Cir. 1970). This rule is applicable whenever the proferred testimony or affidavit of the jurors relates to the mental process of any juror or of the jury in arriving at a verdict. McDonald, supra; Hyde, supra; Domeracki v. Humble Oil & Refining Co., 443 F. 2d 1245, 1247 (3rd Cir. 1971); Morgan v. Sun Oil Co., 109 F. 2d 178, 180 (5th Cir. 1940). Matters inherent in the jury process falling within the no-impeachment rule include challenges that the verdict resulted from compromise, coercion, majority vote, improper motives, misapplication or misapprehension of the law, or a quotient verdict. See, *McDonald, supra;* [. . . cited cases omitted . . .].

> "'An exception to the rule exists as to matters of an overt character not inherent in the jury's decisional process. Thus, a juror may testify to facts concerning an extraneous influence, such as acts or declarations outside the jury room, but the juror is incompetent to testify as to the effect of the influence upon his mental process in arriving at the verdict. *Mattox* v. *United States,* 146 U.S. 140, 13 S. Ct. 50, 36 L. Ed. 917 [. . . cited cases omitted . . .].
>
> "Plaintiff's grounds for the motion to interview jurors based upon the jury's possible missapplication of the law and improper method of reaching a verdict relate to matters inherent in the jury process. Presupposing the actual existence of grounds, evidence elicited upon such matters from the jurors would not subject the verdict to legal challenge due to the no-impeachment rule. Thus, an interview of the jurors for the reasons advanced by plaintiff would not provide legally competent proof, assuming such grounds were revealed, to attack the verdict."

In *Rotondo* v. *Isthmian Steamship Co., supra,* 243 F. 2d, at 583, it is held that:

> "[I]t is completely well settled that, when objection rests upon the juror's testimony as to what were the reasons that in fact induced them to find their verdict, the court will not hear them. That is not indeed because the verdict would, or could, survive the facts if they were disclosed; but because the law will not permit a decision to be reopened to which all have assented. Wigmore likens the situation to that that refuses to consider parol evidence to vary a written instrument."

And, *Bateman* v. *Donovan, supra,* 131 F. 2d, at 765, holds that:

> "In the instant case appellant alleges 'misconduct' upon the part of the jury. From the contents of . . . appellant's argument as detailed in his brief, it is apparent that the particular 'misconduct' endeavored to be established is that there was a mistake of the evidence and misapprehension of the law by the jury. In view of the facts here presented a very apt statement of the law is the following: '. . . the general rule is, that affidavits of jurors will not be received to prove any mistake of the evidence or misapprehension of the law, on the part of the jury. . . . The verdict, in which they all concur, must be the best evidence of their belief, both as to the fact and the law, and therefore must be taken to be conclusive . . .'"

Accordant decisional and treatise law:

Moore's Federal Practice (1975), vol. 6A § 59.08 [4], pages 59-130 to 59-151.

Young v. *United States,* 163 F. 2d 187, 189 (10th Cir. 1947), cert. denied 332 U.S. 770, 68 S. Ct. 83, 92 L. Ed. 355 (1947).

Department of Water & Power v. *Anderson,* 95 F. 2d 577 (9th Cir. 1938), cert. denied 305 U.S. 607, 59 S. Ct. 67, 83 L. Ed. 386 (1938).

Poindexter v. *Groves,* 197 F. 2d 915 (2d Cir. 1952).

Schirra v. *Delaware, L. & W. R. Co.,* 103 F. Supp. 813, 824 (M.D. Pa. 1952).

Hurst v. *Coley,* 15 Fed. 645, 646 (S.D. Ga. 1822).

Significantly, in the instant case, the petitioner seeks to impeach the jury verdict involving matters inherent in

the jury process, not through any testimony or affidavits of the jurors or the like, but by means of his own undocumented, subjective and figmental assessment of a jury's intelligence, which he apparently contends provides legally competent proof to upset the unanimous verdict of the jury and judgment entered thereon. And this, notwithstanding the settled rule of law that, even in cases involving alleged misconduct of the jury, not inherent in the jury process itself, the proof thereof must be clear, affirmative and satisfactorily established by competent proof.

Orenberg v. *Thecker,* 79 U.S. App. D.C. 149, 143 F. 2d 375 (1964).

Berenter v. *Stagger,* 124 U.S. App. D.C. 141, 263 F. 2d 971 (1966).

Harris v. *The Cecil N. Bean,* 197 F. 2d 915, 918 (2d Cir. 1952).

5 *C.J.S., Appeal & Error,* § 1560(a), pages 1196, et seq.

The basic presumptions of law are stated in 5 *Am. Jur. 2d, Appeal and Error,* § 892, pages 331-332:

> "In reviewing instructions, the appellate court cannot start with the assumption that jurors are totally untutored persons knowing nothing of the practical administration of justice. The general presumption of correctness and regularity of the proceedings in the court below applies in support of the correctness of the instructions given by the trial court . . . In the absence of exceptions to instructions given and requests for other instructions, an appellate court will presume that all issues made relevant by pleading or evidence were submitted to the jury under proper instructions. These presumptions are

> rebuttable, but the party claiming on appeal an instruction error has the burden of proof of the correctness of that claim"

Unable to rebut the presumptions aforesaid by a monosyllabic allusion to the record, the petitioner seeks to "rebut" them by nothing more or less than the figment of an overstimulated imagination.

It needs no citation of cases for the precept that negligence vel non is preeminently a factual issue within the exclusive province of the trier of the facts—here, the jury. It is the exclusive privilege and function of the jury to draw or not to draw the permissible inference of negligence under the "res ipsa loquitur" doctrine in the first place. The law commits the decision to the entire jury. *Kulbacki* v. *Sobchinsky,* 38 N.J. 435, 444-445, 185 A. 2d 835 (Sup. Ct. 1962). Where a jury declines to draw any inference of negligence on the part of a defendant under that doctrine, its verdict of no cause of action for the defendant, under uniform decisional law, cannot for that reason be set aside, and the judgment entered thereon is conclusive in such respect.

As far as we are able to ascertain from the present Petition, the argument of petitioner appears to be that, since the jury, in rendering its unanimous verdict for the defendant based upon eminently accurate jury instructions declined to draw the permissible, and not mandatory, inference of defendant's negligence, the petitioner was ipso facto denied due process of law. In such vein he appears to argue, at least tacitly, two disparate theories: (i) that a presumption of law can be overcome by a party against whom a unanimous jury verdict was rendered by such party's unvarnished, undocumented, speculative, conjectural and figmental assessment of a jury's

intelligence, or (ii) that a converse presumption should apply, namely, that all jurors are presumed conclusively to be so lacking in innate intelligence that their verdicts [unless, apparently favorable to the petitioner] constitute denials of due process of law, at least to the non-prevailing party.

That the petitioner has embarked upon the infinite domain of conjecture appears clear from his Petition wherein he says (Pb3-26):

> "*If* the jury does not understand the instruction with the thoroughness required to apply it properly, *a* plaintiff is denied due process." (emphasis supplied).

We find no factual support whatever, nor have we been cited to any, for such a claim in the case *sub judice.* Nor do the well-settled principles above discussed permit him to indulge in speculation and guesswork for which there is not a scintilla of support in the record, other than petitioner's disappointment at the verdict and judgment entered thereon.

> *Maher* v. *Isthmian Steamship Co.,* 253 F. 2d 414, 419 (5th Cir. 1958).
> *Kingsport Utilities, Inc.* v. *Lamson,* 257 F. 2d 553 (6th Cir. 1958).
> *Dunn* v. *United States,* 284 U.S. 390, 394, 52 S. Ct. 189, 76 L. Ed. 356 (1932), 80 A.L.R. 161, 163 (1932).

The absence of competent proof herein is fatal to the charge of petitioner that his rights under the Fourteenth Amendment were violated.

> *United States ex rel. Jackson* v. *Brady,* 133 F. 2d 476 (4th Cir. 1943), cert. denied 319 U.S. 746,

63 S. Ct. 1315, 87 L. Ed. 1702 (1943), reh. denied 319 U.S. 784, 63 S. Ct. 1315, 87 L. Ed. 1727 (1943).

Petitioner's novel, if not absurd, contentions illustrate the wisdom of the longstanding rule that courts will not inquire into the reasoning or mental processes by which a jury reached its verdict. *Womble* v. *J. C. Penney Co., Inc.,* 47 F.R.D. 350 (E.D. Tenn S.D. 1969), affirmed 431 F. 2d 985 (6th Cir. 1970).

Apropos to the case at bar is the holding of the Court in *Bradford Builders, Inc.* v. *Sears, Roebuck & Co., supra,* 270 F. 2d, at 655:

> "The welter of factual issues presented by this case were, by their very nature, of the sort peculiarly adapted to consideration by a trial jury. Under fair and apppropriate instructions by the District Court they were submitted to a jury, whose verdict should effectually put them to rest. This appeal, in its essence, really asks this Court to review, not the trial judge, but the trial jury, which we are powerless to do."

We need but add that, under petitioner's bizzare theory, it is difficult, if not impossible, to discern any jury verdict that could ever be said to stand as final, since no matter which party prevailed, the losing party could assert before the District Court, the Circuit Court of Appeals, and the Supreme Court that such adverse verdict and judgment entered thereon ipso facto constitutes a denial of due process of law.

It is submitted that the contentions advanced by petitioner for a writ of certiorari are so basically deficient and absurd as to be nothing short of frivolous.

B. No constitutional issue vaguely exists in the case at bar, nor was any such issue remotely raised in the courts below.

Utterly without the citation of a single supportive authority or fact discernible from the record other than his disappointment at the verdict and judgment entered thereon, the petitioner baldly asserts that:

> "Petitioner herein was denied due process." (Pb5-19)

At no juncture before the Courts below did the petitioner ever raise any constitutional question, much less the due process clause of the Constitution of the United States (Record, *passim*).

It is the settled rule of law that a question of law which was not presented to or passed upon by the trial court cannot, absent fundamental error, be raised on appeal for the first time.

> *Virtue* v. *Creamery Package Co.,* 227 U.S. 8, 38-39, 33 S. Ct. 202, 57 L. Ed. 393 (1913).
> *United States* v. *Bollman,* 81 F. 2d 1009, 1010 (8th Cir. 1936).
> *Cone* v. *Beneficial Standard Life Ins. Co.,* 388 F. 2d 456, 461 (8th Cir. 1961).
> *Krug* v. *Mutual Benefit Health & Accident Ass'n,* 120 F. 2d 296, 301 (8th Cir. 1941).
> See that entire line of cases in *U. S. Supreme Court Digest, Lawyer's Edition* (1969), Appeal and Error, Key No. 215(1).

As held in *Thomas* v. *Iowa,* 209 U.S. 258, 263, 28 S. Ct. 487, 52 L. Ed. 782 (1908):

> "The Federal question, if it can be found in the record at all, must be found in this statement. It is

too late to raise it for the first time in the petition for writ of error from this court or in the assignments of error here. *Haire* v. *Rice,* 204 U.S. 291. A mere claim . . . that there has been a denial of due process of law does not of itself raise a Federal question with sufficient distinctness to give us jurisdiction to consider whether there has been a violation of the Fourteenth Amendment of the Constitution [. . . cited cases omitted . . .]."

As held in *Farrell* v. *O'Brien* [*Callahan* v. *O'Brien*], 199 U.S. 89, 100, 25 S. Ct. 727, 730, 50 L. Ed. 101, 107 (1905):

"It is settled that the mere averment of a constitutional question is not sufficient, where the question sought to be presented is so wanting in merit as to cause it to be frivolous, or without any support whatsoever in reason . . . We think that the alleged violations of Federal rights based upon the Fourteenth Amendment were so unsubstantial and devoid of merit that they furnish no real support to the [petitioner's] contention." [bracketed word supplied and substituted].

In *Deming* v. *Carlisle Packing Co.,* 226 U.S. 102, 105, 33 S. Ct. 80, 81, 57 L. Ed. 140, 143 (1912), it is said that:

"That the unsubstantial and frivolous character of the only Federal question relied upon of necessity embraces the conclusion that the writ was prosecuted for delay is, in our opinion, indubitable."

And, in *Missouri Pac. R. Co.* v. *Castle,* 224 U.S. 541, 544, 32 S. Ct. 606, 608, 56 L. Ed. 875, 878 (1912), this Court stated:

"[T]he questions urged upon our attention as a basis for reversal of the judgment have been so

plainly foreclosed by decisions of this Court as to make further argument unnecessary."

And, as stated by this Court in *Roe* v. *Kansas ex rel. Smith,* 278 U.S. 191, 193, 49 S. Ct. 160, 73 L. Ed. 259 (1929):

"The alleged ground for the present writ is without substance, and upon the circumstances justify the imposition of a penalty upon the party at fault."

Accord:

United States v. *Johnson,* 327 U.S. 106, 66 S. Ct. 464, 90 L. Ed. 562 (1946).
Cornell Steamboat Co. v. *Phoenix Const. Co.,* 233 U.S. 593, 599-600, 34 S. Ct. 701, 704, 58 L. Ed. 1107, 1110 (1914).
Ruckman v. *Bergholz,* 131 U.S. cxliii, 23 L. Ed. 1008 (1877).
St. Pierre v. *United States,* 319 U.S. 41, 63 S. Ct. 910, 87 L. Ed. 1199 (1943).

Notwithstanding (a) petitioner's failure to raise any constitutional question during the trial proceedings, (b) his full acquiescence without reservation of the trial court's instructions to the jury, and (c) his total failure to comply, even remotely, with Rule 51, *supra,* petitioner now, for the first time, as an afterthought of an adverse unanimous jury verdict, baldly states:

"[P]etitioner was denied his Fourtheenth Amendment right of due process . . . [solely because of] a jury's inability to comprehend the doctrine of 'res ipsa loquitur." (Pb5-28) [bracketed material supplied].

In *Michel* v. *State of Louisiana,* 350 U.S. 91, 99, 76 S. Ct. 158, 100 L. Ed. 83 (1955), reh. denied 350 U.S. 955, 76 S. Ct. 340, 100 L. Ed. 831 (1956), this Court said:

> "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by failure to make timely assertion of the right . . . *Yankus* v. *United States,* 321 U.S. 414, 444."

Failure to raise a constitutional question during the trial proceedings amounts to a waiver thereof and cannot thereafter be raised on appeal.

Frank v. *Mangum,* 237 U.S. 309, 338, 35 S. Ct. 582, 59 L. Ed. 969 (1915).

Patton v. *United States,* 281 U.S. 276, 50 S. Ct. 253, 74 L. Ed. 854 (1930), 70 A.L.R. 263 (1931).

Sanderlin v. *Smyth,* 138 F. 2d 729, 731 (4th Cir. 1943).

United States ex rel. Jackson v. *Brady, supra,* 133 F. 2d, at 481.

And, in *Ralston* v. *Cox,* 123 F. 2d 196, 198 (5th Cir. 1941), cert. denied 315 U.S. 796, 62 S. Ct. 488, 86 L. Ed. 1197 (1942), the Court said that:

> "If constitutional rights may be waived, as is well settled, they are also subject to the legal principles of estoppel.[7]

And, even assuming, *arguendo,* that this had been a case where the herein so-called "constitutional question" had been raised in the courts below, it would appear man-

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[7] As held in *Cone* v. *Beneficial Standard Life Ins. Co., supra,* 388 F. 2d, at 461:

> "Appellant's counsel did not point out any insufficiency [in the jury instructions]. Under the circumstances, we feel appellant is estopped to raise specific error at this time."

See, *Krug* v. *Mutual Benefit Health & Accident Association, supra,* 120 F. 2d, at 301.

ifest that such averment of a constitutional question is so wanting in merit as to cause it to be frivolous, or without support whatsoever in reason. We submit that in such event the alleged violation of Federal right based upon the Fourteenth Amendment was so unsubstantial and devoid of merit that it furnished no real support to petitioner's contention. Petitioner speaks in terms of generalities, nonspecifics, and points to no specific ruling below. He talks at random about "*a* jury", "if" a certain situation existed. He submits no instructions on the issue, and submitted none below. It is clear that the only instruction on res ipsa loquitur, no matter how phrased, which would not, under petitioner's theory, have deprived petitioner of his rights under the due process clause would have been one which eventuated in a jury verdict and judgment in his favor. According to petitioner, all else ipso facto deprives him of his constitutional rights under the Fourteenth Amendment to the Constitution of the United States.

The so-called "constitutional question" raised by petitioner herein is, it is submitted, at the least speculative and conjectural in the highest degree, and at the most a non-existent illusion within the framework of the case *sub judice.*

Clearly, no constitutional question can be said to arise, much less can a judgment based upon a unanimous jury verdict, as herein, be upset by sheer speculation and guesswork on the part of petitioner. It is easy to indulge in imagination, but imagination is not a legal way of arriving at a constitutional question or for setting aside a valid and subsisting judgment entered upon a unanimous jury verdict.

Dunn* v. *United States, supra.

Kingsport Utilities, Inc.* v. *Lamson, supra.

Maher v. *Isthmian Steamship Co., supra.*

Moore's Federal Practice (1974), vol. 6A, § 59.08 [4], page 59-140.

And, equally well settled is the principle that it is not the function of a Supreme Court to decide abstract, hypothetical, fictitious, or moot questions or cases, bearing in mind that the underlying thesis for the present Petition is the abstract, theoretical, moot, and fictitious proposition stated by petitioner himself (Pb3-26): "*If* the jury does not understand the instruction with the thoroughness required to apply it properly, a plaintiff is denied due process."[8]

It would serve no useful purpose to further illustrate the illusory nature of the Petition herein. We have only endeavored to point out some of the more salient features in the reductio ad absurdum contentions advanced by petitioner.

See that entire line of cases cited in:

4 *C.J.S., Appeal & Error,* § 40, pages 153, et seq.

5 *C.J.S., Appeal & Error,* § 1354(1), page 404.

5 *Am. Jur. 2d, Appeal and Error,* § 761, page 203.

West Key System:

"*Appeal & Error*", Key Nos. 781 and 843.

"*Action*", Key No. 6.

"Constitutional Law", Key No. 46(1).

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[8] A question of law depending upon a state of facts not proved will not be considered by an appellate court. *State* v. *Baker,* 35 N.M. 555, 289 P. 801 (Sup. Ct. 1930), cert. denied *sub nom. Baker* v. *State of New Mexico,* 319 U.S. 41, 63 S. Ct. 910, 87 L. Ed. 1199 (1943).

CONCLUSION

The Petition herein appears to be utterly without substance, in that the alleged violations of Federal rights based upon the Fourteenth Amendment are so unsubstantial and devoid of merit that they furnish no support to petitioner's contentions. The question sought to be presented is so wanting in merit as to cause it to be designated as frivolous and without any support whatsoever in reason.

Wherefore, for the reasons above advanced, it is respectfully submitted that the Petition should be denied, and that the Judgment Order of the Circuit Court be affirmed in all respects.

Respectfully submitted,

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